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Issue Date: 19 May 2005

CASE NO.: 2004-LHC-1039

OWCP NO.: 02-118659

IN THE MATTER OF:

JOHN W. KNEBEL,
Claimant

v.

GENERAL DYNAMICS CORP.,
Employer

and

TRAVELERS INSURANCE COMPANY,
Carrier

APPEARANCES:

Gary Pitts, Esq.,
On behalf of Claimant

William C. Cruse, Esq.,
On behalf of Employer/Carrier

BEFORE: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER GRANTING CLAIMANT'S MOTION FOR SECTION 22 MODIFICATION

This is a claim for a Section 22 Modification of compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq*., as extended by the Defense Base Act, 42 U.S.C. § 1651 (herein the Act), brought

by John W. Knebel (Claimant) against General Dynamics Corp. (Employer) and Traveler's Insurance (Carrier). On March 22, 2001, a Decision and Order by the Hon. Richard C. Avery was originally filed in this matter wherein Claimant was found temporarily totally disabled from August 20, 1996 and continuing, based on an average weekly wage of $560.61. Employer was ordered to provide all reasonable and necessary medical expenses, including treatments from Dr. Rea and Dr. Didriksen, arising from Claimant's work-related condition. On June 2, 2003, Judge Avery issued a second Decision and Order addressing the issue of Section 7 medical benefits, finding Employer responsible for medical treatment provided by Dr. Rea, including vaccinations, antigen therapy, oral and intravenous vitamins and minerals and oxygen therapy.

Claimant has filed a request for Section 22 Modification asserting he is permanently totally disabled. Employer also filed a request for Section 22 Modification asserting Claimant is capable of working, thus, permanently partially disabled. The dispute could not be resolved administratively and the case was referred to the Office of Administrative Law Judges for a formal hearing. The hearing before the undersigned was held on March 7, 2005, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced five (5) exhibits, which were admitted, including: U.S. Veterans' Administration research report on Gulf War Syndrome; and medical records of Dr. Rea and Dr. Didriksen.[1] Employer introduced thirteen (13) exhibits, which were admitted, including: medical records and depositions of Drs. Griffiss, Davis, Heilbronner; vocational records of Nancy Favaloro; the original Decision and Order dated March 22, 2001; and Claimant's claim for compensation and discovery responses.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's exhibits- CX-, p.__; Employer's exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant suffers an occupational disease.

2. Claimant's injury was in the course and scope of employment.

3. An employee/employer relationship existed at the time of the injury.

4. Employer was advised of the injury on May 24, 1996.

5. Employer filed a notice of Controversion on October 30, 1996.

6. An informal conference was held in the present claim on January 12, 2004.

7. Claimant's average weekly wage was $560.61.

8. Employer paid temporary total disability benefits from August 20, 1996 to the present, for a total of $166,090.06 as of March 5, 2005.

9. Claimant is permanently disabled.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Date of maximum medical improvement.

2. Extent of disability and loss of wage earning capacity.

3. Attorney’s fees.

III. STATEMENT OF THE CASE

A. Claimant's Testimony

Claimant lives alone in Chicago, Illinois. He was last employed in August, 1996, and began receiving Social Security Disability benefits in March, 1998. He testified that since the decision issued in March, 2001, his condition feels the same to worse. Claimant testified he spends his day reading the newspaper, watching television, going to the grocery store, visiting with neighbors and playing video games. Claimant explained Dr. Didriksen recommended he play video games to help stimulate his brain. (Tr. 21-23, 28). Claimant further testified he is highly sensitive to smells, including diesel fuel and perfume, which cause him headaches and stomach pains. Claimant also has problems with scattered thinking patterns, memory loss and fatigue. He takes frequent naps throughout the day. (Tr. 25-29).

Claimant stopped driving in 2003, secondary to a series of accidents where he rear-ended other cars because his brain could not process the flow of traffic to enable him to stop his car in time. Additionally, when he worked as a repossession agent, he would often get lost while out on the job and not be able to find his way to the next location or back to home base. (Tr. 31-32). Claimant testified his temper has become worse since his disease. He mostly interacts with his parents, sons and grandchildren. He keeps in contact with a few old military friends and has one or two close friends in Chicago. (Tr. 30, 33-34).

Claimant testified he does not believe he could work as a mechanic, as he did during the war, because it involves too much skilled work with his hands. He did not think he could hold any kind of steady job, as he would most likely "get lost," and he expressed concern he would make mistakes that would harm people. (Tr. 35-37).

On cross-examination, Claimant testified he has treated with Dr. Rea twice, once in 2002 and once in 2004. The second visit was in response to Employer's notification they would cut off benefits without evidence of his treatment or disability. Claimant also treated with Dr. Didriksen. Claimant testified he has treated at the VA hospital for problems with his prostate and he has plans to go back to see his treating psychiatrist, as Dr. Didriksen suggested. (Tr. 37-40). Dr. Didriksen also advised Claimant to avoid toxic and neurotoxic substances, which he testified he is doing. He testified he uses lists, schedules and written reminders to help with his memory loss, per Dr. Didriksen's recommendation. Specifically, Claimant keeps a daily calendar to remind him of certain events and writes a list

every time he goes to the store so he does not forget anything. Claimant testified he has used calendars and lists since his symptoms began, but probably more so since he last saw Dr. Didriksen and since his deposition. (Tr. 40-42). Claimant testified Dr. Didriksen also recommended he continue to learn by reading, learning computer skills and taking classes to improve his functioning. Claimant tries to read more, attempted to work on the computer which was too difficult, but he did not look into any classes. (Tr. 42-43).

Although Dr. Didriksen advised Claimant to increase his communication with others and participate in social events, Claimant testified his sensitivity to smells prevents him from doing so; he stated that multiple smells in one location makes him pass out. As a result, Claimant leads the life of a hermit, except for his small group of friends and family. (Tr. 44). Claimant treated with Dr. Haddad, a psychiatrist at the VA, but he testified the VA only recently acknowledged the existence of Gulf War Syndrome; prior to this Dr. Haddad told Claimant there was nothing wrong with him. Aside from treating at the VA, Claimant did not seek therapy from a mental healthcare professional, as Dr. Didriksen recommended. Claimant testified he did cut down on the amount of tobacco he chews, but not much. He also decreased his use of marijuana to once a day or once every two or three days; marijuana was not medically prescribed to him. Claimant testified he had an addiction to crack cocaine following his wife's death, but he has not used it in more than 16 months. He has also discontinued the use of alcohol in the past year. (Tr. 45-48).

Claimant has lived alone since his wife passed away; he testified he was capable of taking care of himself with respect to bathing, dressing, cleaning the house, etc. He testified he quit eating at home because his hearing loss prevented him from noticing when he left the water running. Specifically, his neighbor had to tell him when she heard his water running so he could turn it off; one month his water bill was $500.00. He would also forget when the stove is on, so he stopped using it as well. Claimant testified he did keep food in the house and was capable of fixing himself a sandwich when he needed to. (Tr. 48-50, 58). Notwithstanding the fact Claimant stopped driving, he was capable of leaving the house to go to the grocery store or drug store to pick up necessities when he needed to; he walked, took public transportation, called a cab or was picked up by a friend or family member. He has also left to go to the doctor, restaurants, the library, the mall and to visit his family and friends; Claimant testified the mall sometimes causes him pain because there are too many smells. Approximately one year before the hearing Claimant played paint ball with his friends. (Tr. 51-54).

Since the original formal hearing in 2000, Claimant has not worked nor looked for a job. He was aware the doctors in California and one doctor in Chicago have opined he is capable of working; he later testified he was not aware of other doctors besides Dr. Rea and Dr. Didriksen who opined working would benefit him. Claimant stated he was not informed until the day before the hearing on modification that a vocational rehabilitation specialist was hired and found job opportunities for him in Chicago. He testified he was not interested in learning about these jobs and had no intention of applying for them, secondary to the medical evidence indicating he was not capable of working. (Tr. 55-56). Claimant testified he was hesitant to work because he believed he may make mistakes that would jeopardize people's lives. Additionally, he did not believe he was a people-orientated person, thus, he would not want to work in a customer service position. He also stated because his discharge from the Army was not an honorable discharge, he is not available for any security guard positions. Claimant testified he would have a problem working an eight hour day due to his chronic fatigue syndrome; he clarified he did not have control over his fatigue and does not feel he could compensate for it in the work place. (Tr. 59, 62-63, 66-68). Claimant stated he could not work as a telerecruiter secondary to his hearing loss, which was from the artillery explosions he witnessed. He would also hesitate to work around machinery out of concern he may leave it on and forget about it, as he did with his stove and faucets at home. (Tr. 69-70).

B. Testimony of Nancy T. Favaloro

Ms. Favaloro was tendered and accepted as an expert witness in the field of vocational rehabilitation. She performed vocational analyses of Claimant in 2000 and again in 2005 in preparation for the hearing on modification; she did not personally meet with Claimant in preparing her reports. Ms. Favaloro also performed a labor market survey (LMS) in connection with Claimant's case, issuing reports on February 15, 2005 and February 22, 2005. She testified she reviewed Claimant's medical records provided to her, including reports and depositions of Dr. Heilbronner, Dr. Davis, and Dr. Griffiss. She testified she was aware Dr. Rea opined Claimant was not capable of working at all and assigned him a permanent and total disability rating; her findings are based on the other medical records which released Claimant to some form of work. (Tr. 72-74, 90). Ms. Favaloro testified the labor market survey was conducted in the Greater Chicago area, and took into consideration Claimant’s reliance on public transportation and restricted functioning level. She clarified that the LMS was only a representative sample of the types of jobs available to Claimant in his geographic area, and did not include every single job in the Chicago metropolitan area. (Tr. 75-76).

The jobs identified by Ms. Favaloro in her LMS are as follows:

JOB	DUTIES	PHYSICAL DEMAND	WAGES	DATE
Manager Trainee	18-month training provided in loan underwriting, risk management and community service	Light Duty; sit frequently with alternate standing and walking	Low $20s per year	2/15/05
Customer Service Representative	Manage in-bound phone calls and answer questions from customers; no cold calling; computer training provided	Sedentary; no lifting over five pounds	$12-$14 per hour	2/15/05
Reservationists	Manage in-bound phone calls and answer questions about travel; book travel reservations	Sit frequently, lift maximum ten pounds	$11 per hour	2/15/05
Unarmed Security Guard	In office building; protect lobby area, report suspicious activities; check identification; watch security cameras	Sit frequently, alternately stand and walk to patrol lobby area; lifting 20 pounds maximum	$11 per hour $8.50-$13 per hour	2/15/05 and 2/22/05
Telerecruiter	At a blood blank center, will call past donors to schedule next appointment; training in computers provided; repetitive tasks	Sedentary; sit frequently with lifting not to exceed 20 pounds	$10 per hour	2/15/05
Dental Lab Technician Trainee	Training provided to learn to create dental and orthodontic appliances	Sit frequently, occasionally stand and walk; use hands; lifting max 10 pounds	$10-$12 per hour	2/22/05
Photo Lab Worker	Process photo processing requests; use machines to print photos from discs and negatives; add paper and chemicals to machines as needed	Alternately sit, stand and walk; lifting 35-40 pounds on occasion, but 20 pound restriction would be considered	$10 per hour	2/22/05
Electronics Assembler	Trained to manufacture electronic switches using hand-held tweezers and other hand tools	Mainly seated while using upper extremities; occasional stand or walk; lifting 10-15 pounds maximum	$7 per hour	2/22/05

(*See* EX-9, pp., 10-14).

Ms. Favaloro testified these jobs fall within the limitations of Claimant's abilities and are vocationally appropriate for him. Ms. Favaloro acknowledged Dr. Griffiss' marginally approved the reservationists' position and Dr. Davis disapproved of it completely. Drs. Griffiss, Heilbronner and Davis opined the

manager trainee position was not appropriate for Claimant. (Tr. 76-77). Thus, Ms. Favaloro testified Claimant's potential employment opportunities as listed in the LMS include customer service representative, unarmed lobby security officer and telerecruiter. She clarified the customer service representative position did not involve exposure to people. Ms. Favaloro acknowledged Claimant was advised not to have a lot of public contact, but because these customers were calling in and already interested in placing an order, she felt it was an appropriate amount of contact for Claimant who would simply place orders. (Tr. 76-77). She further explained the telerecruiter position was not a marketing position, but involved calling regular donors of a blood bank to schedule their next appointment. Ms. Favaloro emphasized these telephone positions do not place Claimant in a position where he has to deal with the public face-to-face. Moreover, although he has a hearing problem, she testified many phones are equipped with volume controls to assist him. (Tr. 77-78).

Ms. Favaloro further testified she informed the security company employers of Claimant's less than honorable discharge from the Army secondary to drug abuse, and they indicated they were still willing to consider him for the available jobs. She clarified that she was not aware of any law that would prevent him from working as a security guard. (Tr. 77-79). Ms. Favaloro testified she removed the dental lab technician trainee and electronics assembler jobs from the LMS secondary to Claimant's neuropathy because he would be working with small tools and pieces. Ms. Favaloro testified the doctors did approve the photo lab and unarmed security guard positions for Claimant even in light of his fatigue problems. She further stated the unarmed security guard listings included multiple openings. She testified the photo lab position involved some work with chemicals, as Claimant would have to refill the chemicals in the machine as needed. However, Ms. Favaloro explained that a lot of the developing is digital and done on machine; the job is not in a dark room where the employees work primarily with chemicals. Additionally, the doctors have approved the photo lab position in light of the chemical usage. (Tr. 79-83).

Based on the LMS conducted, Ms. Favaloro opined Claimant had a wage earning capacity between $8.50 and $12.00 per hour. (Tr. 83-84).

On cross-examination, Ms. Favaloro testified she reviewed and was aware of Dr. Davis' opinion about Claimant's anger issues. In response to Dr. Davis' statement, that Claimant should avoid a job where verbal conflicts over trivial matters could escalate to a dangerous situation, Ms. Favaloro acknowledged every job in the real world has some level of aggravation. (Tr. 84-85). Ms. Favaloro

stated that Dr. Davis' opinion that normally minor aggravations could be serious to Claimant and could negatively affect his ability to work a regular job; however, she also noted that Dr. Davis approved most of the jobs she presented to him, which indicated he thought Claimant could try to do them, despite his reservations. (Tr. 87-88).

In response to Dr. Didriksen's April 21, 2004, report that Claimant "continues to demonstrate severe impairment on a complex measure of visual tracking and scanning suggesting that he would have difficulty in any work-related setting requiring multitasking," Ms. Favaloro testified all jobs have varying degrees of visual tracking and scanning. She also stated that each job involves new learning, problem solving, abstract reasoning, concept formation, mental efficiency and judgment, areas in which Dr. Didriksen opined Claimant was severely impaired. However, Ms. Favaloro testified Dr. Didriksen's opinion that Claimant would have significant difficulty adapting to new situations or demands and performing consistently and reliably in the workplace and in his everyday life not only mitigates Claimant's ability to work, but also would keep him from living day-to-day. (Tr. 90-93). Ms. Favaloro further testified Claimant's memory impairments would not preclude him from working, although it may be more difficult for him to obtain a job. (Tr. 94). Also, assuming Claimant validly suffered significant anxiety, depression, impaired coping ability, social isolation, withdrawal, anger and frustration, he would have difficulty finding and maintaining employment. However, Ms. Favaloro opined these conditions can be mitigated through therapy. (Tr. 95).

C. Claimant's Medical Evidence

Since the 2001 Decision and Order in this case, Claimant treated with Dr. William Rea, who is board certified in environmental medicine, on June 5, 21 and 27, 2002; July 2, 3, 15 and 17, 2002; August 21, 2002; April 5, 8, 12, 20 and 27, 2004; and May 7, 13 and 20, 2004, for a total of sixteen (16) visits in two years. (CX-4). On August 21, 2002, Dr. Rea diagnosed Claimant with toxic encephalopathy, toxic effects of petrochemicals, solvents and pesticides, Desert Storm syndrome, immune deregulation, chemical sensitivity, chronic fatigue, fibromyalgia, and autonomic nervous system dysfunction. He stated the goal of Claimant's treatment was to identify inciting agents, reduce chemical and antigen exposure, place Claimant in an environment conducive for healing and improve his absorption of essential nutrients and co-factors. Dr. Rea indicated no working environment could comply with this prescribed course of treatment. He explained

that exposure to chemicals and other agents could result in disorientation, inability to think, difficulty concentrating and chronic fatigue. He suggested Claimant "rigidly avoid" any public buildings or physical environments which may expose him to common waxes, cleaners, pesticides, petrochemicals, solvents perfumes, fragrances or other compounds. (CX-4, pp. 113-15). Dr. Rea also recommended intradermal testing, immunotherapy neutralization program, deep heat depuration physical therapy, intravenous therapy with vitamins, minerals, and amino acids, as well as developing a mycoplasma autogenous vaccine for Claimant. (CX-4, pp., 119-20).

On October 21, 2004, Dr. Rea issued a report with essentially the same diagnosis, noting Claimant also suffered from multi-organ system dysfunction, progressive neurotoxicity, and chemical sensitivity secondary to toxic chemicals found in air, water and food. Dr. Rea noted while the effects of chemical sensitivity are generally reversible at their onset, as end-organ involvement increases the responses are more difficult to control. (CX-2, pp., 1, 6-7). Dr. Rea recommended treatment in the form of environmental controls, strict avoidance of exposure to incitants, antigen injections, autogenous lymphocytic fact, heat depuration therapy and oxygen therapy. Overall, Dr. Rea opined Claimant's current condition is a direct result of his chemical exposures while working in Saudi Arabia; his condition remains unstable with a guarded long-term prognosis. (CX-2, pp., 8-10).

Claimant initially treated with neuropsychologist Dr. Nancy Didriksen, Ph.D., in August, 2000. He returned on July 10, 2002 and April 21, 2004, for a re-evaluation of neurocognitive and personality/behavioral concomitants of toxic exposure. In 2002, Dr. Didriksen administered the Wechsler Memory Scale-III, Benton Visual Retention Test, Comprehensive Neuropsychological Screen, Halstead Category Test, Trail Marking Tests A & B, Clinical Analysis Questionnaire and symptom checklists. Claimant presented with complaints of chronic fatigue, fibromyalgia, chemical sensitivity, sleep disturbances and throbbing head pain. She observed Claimant had normal, logical speech, orientation with respect to time and place, slow motor activities, no delusions or hallucinations and depressed mood. Additionally, Claimant reported a lack of interest in activities and persistent fatigue. Dr. Didriksen noted Claimant appeared to put forth his best effort and showed no signs of malingering. (CX-5, pp., 1-3).

Upon evaluation, Dr. Didriksen noted Claimant demonstrated memory deficits and borderline (eighth percentile) performance on attention and concentration tasks. She also noted impaired cognitive functioning and incidental

verbal learning and logical verbal memory deficits. Claimant also scored a 51 on the comprehensive neuropsychological screen, indicating moderate to severe impairment of brain-related abilities overall. He scored in the low-normal range on complex visual tracking and scanning, requiring mental flexibility. Dr. Didriksen stated Claimant's personality profile still exhibited significant depression associated with physical malfunctioning and fatigue, as well as social isolation and withdrawal. (CX-5, pp. 4-5).

Dr. Didriksen indicated in her notes that this evaluation of Claimant was conducted in an environment relatively free of toxins and incitants and under relatively stress-free conditions; under normal conditions the results may have revealed greater deficits in his neurocognitive functioning. She recommended Claimant avoid all toxic/neurotoxic substances; use lists, schedules and reminders to compensate for memory loss; continue active learning from reading, computer skills, or formal/informal classes as tolerated; communicate with others via Internet, if possible, to decrease social isolation and withdrawal; seek supportive and adjustment therapy by a mental health care provider; and consider discontinuing the use of tobacco and alcohol entirely. (CX-5, pp. 6-9).

On April 21, 2004, Claimant presented with many of the same symptoms and complaints as he did in 2002. Dr. Didriksen noted Claimant's negative emotional state appeared to be associated with ill health, inability to work, inability to drive a car, social isolation and withdrawal, and neurocognitive deficits; he exhibited fair to poor insight. Claimant's primary complaints continued to be chemical and environmental sensitivity, worsening bilateral hearing loss, tooth loss and low back pain. Claimant also exhibited decreased coping ability, anger, feelings of rage and pervading pessimism. (CX-3, pp., 1-3).

Overall, Dr. Didriksen opined Claimant remained disabled after toxic exposure and continues to function in a moderately impaired range. Claimant suffers impaired memory abilities, severe impairment in visual tracking and scanning which suggests an inability to multitask, and severe impairment with new learning, abstract reasoning, concept formation mental efficiency and judgment. She further noted Claimant's "impaired scores suggest that he would have significant difficulty adapting to any new situation or demand, or performing reliably and consistently in any workplace setting or on the tasks required of everyday life." (CX-3, p. 6). Her recommended treatment plan was the same as in 2002, including the recommendation that Claimant discontinue all use of tobacco. (CX-3, pp., 6, 8).

D. Employer's Medical Evidence

Dr. Griffiss and Dr. Davis

Claimant was evaluated by Dr. Griffiss, a medical doctor board-certified in internal medicine and infectious diseases with extensive experience in environmental medicine, on September 9, 2004. Dr. Griffiss' deposition was taken on February 25, 2005. Dr. Griffiss served as an Army Medical Officer in the 1991 Gulf War and since 1993 his practice has involved treating 150 veterans for Gulf War Syndrome and directing federally sponsored research into the nature and treatment of Gulf War Syndrome; his findings were published in the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 2003. Dr. Griffiss stated his opinions of Claimant's condition are based primarily on the extensive history obtained from Claimant and the physical examination he conducted on September 9. (EX-3, p. 1; EX-12, pp., 5-10).

Claimant was also evaluated by Dr. Davis on September 9, 2004, at Employer's request. Dr. Davis is board certified in preventative and occupational medicine, as well as emergency medicine. Dr. Davis was deposed on February 25, 2005; he testified he has been a medical doctor since 1969, and in the 1980s he worked with a variety of workers' compensation cases related to exposure to chemicals. In 1989 Dr. Davis began working for the Department of Veteran's Affairs, becoming a "specialist" in environmental agents and was in charge of all environmental exposures. In the 1990s Dr. Davis became involved with veterans returning from the Gulf War and has treated 250 patients with Gulf War Illness (GWI). (EX-11, pp., 4-13).

Dr. Griffiss and Dr. Davis both explained the causation Gulf War Illness (GWI) is a contested issue, though it is largely recognized as the result of a combination of exposures to chemical weapons, pesticides, repellent, esterase inhibitors and various oxidase inhibitors. He testified regardless of the precise causation, GWI results in real physical disabilities for returnees from the Gulf War. Dr. Griffiss explained the patients he treated through his work at the VA all complained of the same symptoms, including dizzy spells, vertigo, and problems dropping things, which he testified are diagnostic of GWI. He also testified studies revealed GWI involves the parasympathetic autonomic nervous system, consistent with the progression of neurological phenomenon Dr. Griffiss observed in his patients. (EX-12, pp., 11-15). Dr. Davis added that GWI symptoms included joint aches and pains, odd skin rashes and memory/concentration problems. Additional symptoms include weakness, fatigue and neuropathies. Dr. Davis testified GWI

was not uniform in nature and affected different people differently. He also stated that the neurological symptoms were generally progressive, whereas the cognitive deficits were generally stable. (EX-11, pp., 21-25). Dr. Griffiss testified that out of the 150 patients he has treated for GWI, about 50% of them are not engaged in any sustained gainful employment. (EX-12, pp., 39-40).

Dr. Griffiss stated Claimant endorsed seven of the eight symptoms of Gulf War Illness, including: apraxia, which is a disconnect between the brain and extremities resulting in losing one's grip on an object, stumbling and jerking; cognitive lapses, such as memory loss; headaches; fatigue; insomnia; dizzy spells and vertigo; and pain. The only symptom Claimant did not have was episodic diarrhea.[2] (EX-3, p. 2; EX-12, pp., 21-26). Dr. Griffiss opined the apraxia and vertigo are disabling neurological conditions. Claimant's complaints of apraxia symptoms were corroborated by a positive Rhomberg test upon physical examination. Dr. Griffiss further opined Claimant's cognitive lapses and impaired immediate recall have also impeded his ability to maintain his job as a repossession agent, as he "gets lost" and has suffered impaired reflexes such that he has stopped driving. However, at his deposition Dr. Griffiss testified, in general, that the GWI symptoms (apraxia, fatigue, insomnia, cognitive lapses, dizzy spells, pain) were limiting factors of employability, though not necessarily disabling. He explained that apraxia and cognitive deficits can be disabling, if severe, but patients may be trained to minimize these symptoms by engaging in cognitive behavioral therapy. (EX-3, pp., 2-4; EX-12, pp., 27-31, 43).

Dr. Griffiss explained Claimant's symptoms are common and normal for people with Gulf War Illness and defined Claimant's prognosis as guarded; he testified Claimant's symptoms are moderate, falling in the middle of his patients. The most problematic symptoms for Claimant are fatigue, cognitive deficits and apraxia. He recommended Claimant's treatment focus on physical therapy, cognitive behavioral therapy, confidence-building measures and vocational rehabilitation. He testified Claimant should reduce his use of marijuana, as it interferes with cognitive behavior. Dr. Griffiss acknowledged Claimant lives alone and is functionally capable of taking care of himself including using public transportation to run errands; he did not have first hand knowledge of Claimant's

[2] Dr. Griffiss testified approximately 20-25% of Gulf War veterans have different degrees and combinations of the eight GWI symptoms; the disease does not affect everyone in the same way. (EX-12, pp., 34-35).

ability to socialize.[3] Overall, Dr. Griffiss stated gainful employment and sedentary jobs are not out of reach for Claimant, once he achieves increased independence and mobility. However, as of the September 9, 2004 evaluation, Dr. Griffiss opined Claimant is currently totally disabled for any reasonable occupation in the absence of effective treatment. (EX-3, pp., 4-6; EX-12, pp., 57-64).

Dr. Davis diagnosed Claimant with post-traumatic stress disorder (PTSD) which, though not disabling, was likely related to his experiences in the Gulf War; polyneuropathy consistent with neurological deficits related to the Gulf War; skin lesions; multi-chemical sensitivity syndrome as a result of his experience in the Gulf; fibromyalgia and fatigue. Claimant also suffered concentration problems and a proprioceptive loss of his extremities, in that he had no sense of where his limbs were in space without actually looking at them. This was confirmed by a grossly positive Romberg test, indicating there was something wrong in Claimant's peripheries, spinal cord or brain. Dr. Davis noted Claimant was unable to work or drive, lived alone and was able to care for himself on a day-to-day basis, though he had minimal relationships and interactions with others. Claimant also complained of anxiety, short temper, hyper-arousibility and frustration. (EX-4, pp., 3-7; EX-11, pp., 38-39, 45-46).

Dr. Davis concluded Claimant's symptoms and complaints, both objective and subjective, were consistent with GWI and rendered him 100% disabled from work. He recommended future medical care, but took exception to Dr. Rea's treatment methods, as specified below. At his deposition, however, Dr. Davis testified work does exist for Claimant as long as it does not involve fine motor skills, hazardous work, prolonged concentration or potential hostile interaction with the public. (EX-4, pp., 8-14).

Dr. Griffiss stated treatments for GWI were not very effective, although cognitive behavioral therapy and aerobic exercise have been beneficial. Dr. Davis testified the only treatment available for GWI was symptomatic in nature, such as aspirin for pain and note pads for memory problems; he explained it was only possible to relieve the symptoms, absent any cure for the disease. Both doctors opined treatments such as Gulf War Vaccines, injections with atropine and cleansing regimens were "unapproved remedies that have no support in the medical

[3] Dr. Griffiss reported Claimant suffers from mild to moderate post-traumatic stress disorder (PTSD) as a result of his experiences in the gulf. He testified people with PTSD have problems with trust and functioning in society, but emphasized that it is a separate and distinct disease from Gulf War Syndrome. (EX-3, p. 2; EX-12, pp. 45, 61).

literature or community" thus they should be avoided because they have no benefit and could make symptoms worse. (EX-3, p. 5; EX-11, pp., 27-28). Dr. Griffiss explained the vaccines Dr. Rea used are not FDA approved, have not been subjected to rigorous scientific testing, and have not resulted in any improvement of symptoms; Dr. Davis described them as fraudulent and bizarre treatment methods. Furthermore, Dr. Griffiss stated there is no logical or scientific basis for the notion that GWI is caused by an on-going toxicity of which the patient needs to be 'cleansed.'[4] He explained that GWI patients suffer a loss of nerve cells in the brain, for which there is no known, proven therapy to replace them. Dr. Davis stated detoxification was a waste of time, as most chemicals damage body tissue and then are metabolized and disappear; he doubted there were any residual chemicals in Claimant's system. Even if there were, simply removing them would not fix the tissue damage already done. Both doctors testified there is no known cure or therapy to stop the progression of GWI, although it is possible to work with the patients to get them functioning at a higher level, explaining massage therapy and sauna treatment would not improve functioning. Dr. Griffiss stated that science is likely to progress and find a treatment to effectively reduce or reverse the symptoms of GWI. (EX-12, pp., 47-52, 75; EX-11, pp., 30-37).

On January 7, 2005, Dr. Griffiss supplemented his opinions, clarifying the level of Claimant's functioning. He stated Claimant cannot drive, is unable to remember a series of tasks, must be able to have 20-30 minutes rest every 3-4 hours, and cannot securely hold items in his hand without looking at them. Dr. Griffiss opined any job Claimant secures must take these limitations into account. He suggested activities that involve primarily sitting, repetitive tasks that can be written down, interactions with the public, and modest levels of typing, computer use and physical exertion would be appropriate. (EX-3, pp., 7-8).

With respect to the vocational rehabilitation report prepared by Ms. Favaloro, and specifically the labor market surveys issued in February, 2005, both Dr. Davis and Dr. Griffiss testified the manager trainee position was not appropriate for Claimant given his inability to retain information and other cognitive deficits; even training would not render Claimant suitable for this type of position. Dr. Davis stated Claimant's temper may affect his ability to be a customer service representative, though Dr. Griffiss approved this position. Both doctors approved the telerecruiter and unarmed security guard positions, but did

[4] However, both Dr. Griffiss and Dr. Davis did not disagree with the Research Advisory Committee on Gulf War Veterans Illnesses, which found a link between exposure to neurotoxins and GWI. (EX-12, pp. 72-73; EX-11, pp. 58-59).

not approve the reservationist's position as it involved too many different things. Additionally, both doctors approved the photo lab position and a second unarmed security guard position, but had reservations about Claimant's ability to work as a dental lab technician or electronic assembler secondary to his apraxia and lack of fine motor skills. Overall, Dr. Griffiss testified Claimant would benefit from seeking employment and described the unarmed security guard positions as an "excellent line of work for him." (EX-12, pp., 67-70; EX-11, pp., 50-56).

Dr. Heilbronner, Ph.D.

Dr. Heilbronner, a clinical psychologist with extensive training and experience in clinical neuropsychology including brain trauma rehabilitation, evaluated Claimant in September, 2000, and again on September 30, 2004. At his February 28, 2005 deposition, he testified Claimant's neuropsychological condition remained stable between the two evaluations. Claimant reported using marijuana a couple of times per day to help him eat, and complained of forgetfulness, cognitive deficits, depression and social isolation. Dr. Heilbronner diagnosed Claimant with depression and anxiety related to physical symptoms and complaints. (EX-13, pp., 5-9; EX-5, p. 31). Dr. Heilbronner testified Claimant suffered some anger issues related to his discharge from the military and had issues in dealing with superiors prior to his deployment to the Persian Gulf in 1990. He also testified Claimant exhibited some symptoms of PTSD, including anxiety, social withdrawal, heightened sensitivity and reaction to physical symptoms, but Claimant did not meet the full criterion to satisfy a diagnosis for PTSD. Even if he did, the PTSD would be mild in nature. (EX-13, pp., 8-11).

In his report, Dr. Heilbronner noted Claimant was unlikely to remain gainfully employed secondary to his focus on his physical symptoms and psychological distress; he also noted Claimant was not taking medication for his psychological problems as of September 2004. Dr. Heilbronner further noted Claimant's increased anger, suspiciousness and social isolation would make work difficult. Vocational training and/or a work hardening program would be necessary as Claimant has not worked since 1996. Dr. Heilbronner also reported Claimant had secondary gain issues and demonstrated no interest or motivation to return to work. (EX-5, pp., 38-40). However, should Claimant return to work, Dr. Heilbronner restricted him to jobs that did not involve sustained attention or concentration, had a supportive working environment with breaks every 3-4 hours, within the sedentary to light physical demand levels, and that would be able to compensate for Claimant's lack of psychomotor speed. Dr. Heilbronner noted

Claimant was capable of learning and remembering a series of tasks when not excessive and with repetition and cueing; however, he acknowledged Claimant's difficult personality style that involved depression, short temper, low frustration tolerance as well as a confrontational and argumentative disposition. (EX-5, p. 40).

At his deposition, Dr. Heilbronner testified Claimant was able to function in the marketplace, from a neuropsychological point of view. He specifically deferred to Dr. Griffiss and Dr. Davis for Claimant's physical and physiological restrictions, except to the extent they impacted his psychological functioning. As such, from a neuropsychological standpoint, Dr. Heilbronner approved the customer service representative, telerecruiter, security guard, dental lab technician, electronics assembler and photo lab technician positions listed in Ms. Favaloro's LMS. Dr. Heilbronner testified the unarmed security guard positions were particularly suitable for Claimant. Thus, he confirmed Claimant can function and job opportunities are available to him in his geographic area. (EX-13, pp., 15-21). Dr. Heilbronner further testified Claimant's cognitive deficits are not curable or even retrainable, but Claimant can be taught to compensate for them such that he could increase his functioning. Dr. Heilbronner added that training work-hardening would support Claimant's return to work and promote pro-social work skills. Specifically, he suggested three to five sessions with a vocational specialist to help Claimant identify potential problem areas and fashion a way to manage different scenarios and stressors. On cross-examination, Dr. Heilbronner testified Claimant's ability to keep a job would depend on the particular work environment and situations. (EX-13, pp., 22-26, 29).

Dr. Heilbronner also testified Claimant needs treatment for his neuropsychological problems, particularly his depression and anxiety. Treating Claimant's psychological problems will likely improve his functionality as well. He deferred to a psychiatrist for any specifics in said treatment. (EX-13, pp., 27-28).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends he is entitled to permanent total disability benefits as of June 16, 2001, based on Dr. Rea's opinion he had achieved maximum medical

improvement on that date. Claimant argues, however, that he suffers a severe case of Gulf War Syndrome and that his symptoms are too severe for him to function in the workplace. Specifically, Claimant asserts his fatigue, temper, chemical sensitivity and cognitive deficits preclude him from being able to obtain or maintain a job. Additionally, Claimant points out that his physicians, Dr. Rea and Dr. Didriksen, have not released him to work.

Employer concedes that Claimant suffers from Gulf War Syndrome, but contends that he suffers only moderate impairment that does not preclude him from working. Employer argues that as Claimant is able to live alone and care for himself, he is similarly able to maintain a job. Employer contends the opinions of Dr. Rea are based on "junk science" and should not be credited over the opinions of Dr. Griffiss or Dr. Davis. Employer further asserts it has established suitable alternative employment in the form of jobs which were approved by Dr. Griffiss, Dr. Davis, and Dr. Heilbronner, and that Claimant has failed to rebut these jobs through a diligent job search. Rather, Employer contends Claimant has no motivation to return to work. As such, Employer asserts Claimant is only entitled to permanent partial disability benefits.

B. Section 22 Modification

Section 22 of the Act permits any party-in-interest to request modification of a compensation award for mistake of fact or change in physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291 (1995). The party requesting modification has the burden of proof to show a mistake of fact or change in condition. *See Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1994). The rationale for allowing modification of a previous compensation award is to render justice under the Act. Congress intended Section 22 modification to displace traditional notions of *res judicata*, and to allow the fact-finder, within the proper time frame after a final decision and order, to consider newly submitted evidence or to further reflect on the evidence initially submitted. *Hudson v. Southwestern Barge Fleet Services*, 16 BRBS 367 (1984).

An initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating there has been a change in circumstances and/or conditions. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (2000). This inquiry does not involve a weighing of the relevant evidence of

record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the contention within the scope of Section 22. If so, the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a change in physical or economic condition. *Id*. at 149.

In the present case, the exhibits support a change in Claimant's physical condition in that Dr. Rea opined he reached MMI as of June 16, 2001, thus, his temporary disability became permanent. Employer offered no evidence to rebut Dr. Rea's opinion, and indeed has agreed Claimant's disability is now permanent. However, the record does not establish Claimant's physical condition has improved, or that his economic condition has changed to support a Section 22 Modification. Dr. Rea, Claimant's treating physician, has consistently restricted Claimant from any kind of work. In 2002, Dr. Didriksen opined Claimant could not work, re-stating her position again in 2004. Employer's medical experts, Drs. Griffiss and Davis, both evaluated Claimant in September, 2004, and reported he was 100% disabled from any work. Although both doctors testified in depositions some six months later that Claimant could return to some work, they failed to reconcile their opinions with the 2004 reports. Furthermore, they provided significant work restrictions, and Ms. Favaloro failed to specify how and to what extent potential employers were prepared to accommodate said restrictions. Notwithstanding Claimant's choice of experimental medical treatment and evident lack of motivation to return to work, which are discussed in detail herein, I find there is insufficient evidence to show a change in Claimant's current physical condition, and, in turn, his economic condition, to support a Section 22 modification to partial disability at the present time.

C. Nature and Extent of Injury

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an

injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

In the present case, Claimant contends he reached MMI on June 16, 2001, per Dr. Rea's letter of that date. Dr. Rea was Claimant's choice of physician and treated him on 16 different occasions since the 2001 decision and order. Dr. Davis and Dr. Griffiss only evaluated Claimant on one or two occasions, and neither made a determination of MMI. While these doctors indicated Claimant could seek to reduce the severity of his symptoms and increase his functioning through cognitive behavior therapy, rehabilitative therapy and physical therapy, there is no evidence said treatments were actually offered to Claimant, or that he unreasonably refused the treatment. Based on the evidence in record, I find Dr. Rea, as Claimant's treating physician, is in the best position to determine when Claimant's symptoms became permanent thus establishing MMI. Employer has not submitted any evidence or made any arguments contradictory to Claimant's assertion that he reached MMI on June 16, 2001, thus I find Claimant's temporary disability became permanent as of that date.

(1) *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former Longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). A claimant need not

establish that he cannot return to *any* employment, only that he cannot return to his *former* employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999)(crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

In the present case, the parties stipulate Claimant is not able to return to his former jobs as a mechanic or as a repossession agent secondary to his Gulf War Syndrome symptoms. This was the finding in the 2001 Decision and Order originally filed in this case, and continues to hold true today. Given Claimant's cognitive and neurological deficits, and in light of the opinions of all doctors involved, Claimant has established a *prima facie* case for total disability.

(2) Suitable Alternative Employment and Wage Earning Capacity

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *Newport News Shipbuilding & Dry Dock Co.*, 841 F.2d 540, 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of

> performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted). An employer may meet its burden of establishing suitable alternative employment by presenting evidence of jobs available in the open market, or by offering the claimant a job in its own facility which the claimant is capable of performing and which does not constitute sheltered employment. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 375, 381 (5th Cir. 1996). Generally, once the employer successfully establishes suitable alternative employment its responsibility is thereby discharged, as the employer is not a continuing guarantor of employment. *P&M Crane Co. v. Hayes*, 930 F.2d 424 (5th Cir. 1991).

It is well-settled that the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner, so long as any determination of credibility is rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000).

In the present case, Dr. Rea and Dr. Didriksen both opined Claimant is totally disabled from any and all work environments. Dr. Griffiss, Dr. Davis, and Dr. Heilbronner all evaluated Claimant in September, 2004, and each opined Claimant was totally disabled from any work. Specifically, Dr. Griffiss reported Claimant was "currently totally disabled," Dr. Davis stated Claimant was "100% disabled from work" and Dr. Heilbronner stated Claimant was "unlikely to remain gainfully employed." Thus, as of September, 2004, the medical evidence clearly indicated Claimant could not return to any kind of work. None of Employer's medical experts evaluated Claimant after September, 2004. Nonetheless, in early 2005 they each curiously released Claimant to work, albeit with some restrictions. This testimony is not supported by the doctors' previous records or a re-evaluation of Claimant's physical and mental condition. The discrepancy between the original evaluations and the supplemental reports is not explained. As such, I find the

testimony of Drs. Griffiss, Davis, and Heilbronner regarding Claimant's ability to work directly contradicts their findings only five months earlier and is not credible.

Additionally, while Ms. Favaloro was able to identify jobs which Claimant could possibly perform, and which were eventually approved by Employer's medical experts, she did not meet with Claimant in preparation of her vocational analysis, instead relying on the many medical records indicating he was not capable of returning to work. Ms. Favaloro's testimony that her vocational analysis was based on the medical reports which released Claimant to work is questionable, as those records directly contradict the prior records indicating Claimant was not able to work. (*See* discussion, *supra*). Furthermore, Ms. Favaloro did not specify in her testimony how the jobs she found were within the restrictions established by Employer's physicians. Dr. Davis restricted Claimant from jobs involving fine motor skills, hazardous work, prolonged concentration or potential hostile interaction with the public. Dr. Griffiss suggested Claimant engage in work that involved primarily sitting, allowed regular breaks, repetitive tasks that could be written down, interactions with the public and modest levels of typing, computer use or physical exertion. Dr. Heilbronner restricted Claimant to jobs that did not involve sustained concentration, had a supportive work environment, allowed him a break every 3-4 hours, were within the sedentary to light physical demand category and would accommodate his slow psychomotor speed. Ms. Favaloro's testimony did not address if the identified jobs would allow sufficient breaks or if the tasks involved were repetitive, capable of being written down and not of a sequence which exceeded Claimant's concentration level and abilities.

In light of the foregoing, I find Employer's evidence of suitable alternative employment is not sufficient to discharge its burden in this matter. Specifically, as I found the testimony of Drs. Griffiss, Davis, and Heilbronner regarding Claimant's ability to return to work incredible, their approval of the jobs identified by Ms. Favaloro is likewise without merit. Ms. Favaloro's own testimony inaccurately described the medical records as releasing Claimant to work. Additionally, notwithstanding the incredibility of the doctors' release of Claimant to work, she failed to reconcile the various positions listed with the specific restrictions recommended. Employer has failed to prove that Claimant is currently capable of returning to work at this time nor identified potential jobs which were sufficient to overcome Claimant's *prima facie* showing of total disability. I therefore find suitable alternative employment has not been established and Claimant remains totally disabled.

However, it should be noted that the extent of disability must be based on the Claimant's vocational abilities at the time of the formal hearing. *Hayes v. P&M Crane Co.,* 23 BRBS 389, 392 (1990), *vacated on other grounds,* 930 F.2d 424 (5th Cir. 1991). In keeping with the Act's goal to promote "the rehabilitation of injured employees to enable them to resume their places, to the greatest extent possible, as productive members of the work force," it is the claimant's burden to establish a willingness and diligent effort to seek work and to cooperate in vocational rehabilitation evaluations. *Louisiana Ins. Guar. Ass'n. v. Abbott*, 40 F.3d 122, 127 (5th Cir. 1994); *Turner*, 661 F.2d 1031; *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99, 102 (1985). Claimant's disability benefits, moreover, may be suspended for an unreasonable refusal to submit to medical treatment. 33 U.S.C. § 907(d)(4); *Dodd v. Newport News Shipbuilding & Dry Dock, Co.*, 22 BRBS 245 (1989).

All of the medical experts who examined Claimant in connection with his claim for benefits have determined he is totally disabled from employment. However, Dr. Griffiss opined gainful employment was not out of reach for Claimant once he achieved greater independence and mobility; for this he recommended physical therapy, vocational rehabilitation and cognitive behavioral therapy, with and emphasis on confidence-building measures. Dr. Davis opined the symptoms of GWI were treatable and Claimant could learn to compensate for them. Dr. Heilbronner recommended psychiatric treatment for Claimant's depression and anxiety, indicating it could improve Claimant's overall functioning. It should also be noted that Claimant testified his condition has worsened despite Dr. Rea's treatments, and he has not followed the recommendations of Dr. Didriksen, in that he continues to smoke marijuana and has not sought psychiatric help. Claimant has exhibited a clear unwillingness to return to work. However, and notwithstanding issues of motivation and secondary gain, the record establishes Claimant is totally disabled at the present time. Should Employer seek to provide Claimant with reasonable and necessary medical services aimed to improve his functioning, it would have potential recourse under § 7(d)(4) in the event Claimant refused to comply. Likewise, if Claimant's earning capacity changes following a rehabilitation program, the remedy is § 22 modification.

D. Conclusion

To summarize, I find Claimant's temporary total disability became permanent on June 16, 2001, when Dr. Rea placed him at maximum medical improvement. He continues to be permanently totally disabled, as Employer failed

to establish suitable alternative employment. Specifically, the testimony of Drs. Griffiss, Davis, and Heilbronner approving Ms. Favaloro's jobs was contradictory to their medical records indicating Claimant was totally disabled from working. Ms. Favaloro also failed to specify how the jobs she identified were within the restrictions provided by Employer's medical experts. As such, Employer failed to discharge its burden and Claimant continues to be permanently totally disabled.

E. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

F. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file

any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from March 22, 2001 to June 15, 2001, based on an average weekly wage of $560.61.

2. Employer shall pay to Claimant permanent total disability pursuant to Section 908(a) of the Act for the period from June 16, 2001 to the present and continuing, based on an average weekly wage of $560.61. Claimant shall be entitled to the annual increase provided for in Section 10(f) of the Act.

3. Employer shall be entitled to a credit for all compensation benefits previously paid to Claimant under the Act amounting to $166,090.06.

4. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act and in accordance with the June 2, 2003 Decision and Order.

5. Employer shall pay Claimant interest on accrued unpaid compensation benefits, in accordance with this decision.

6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge